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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

GTE Macro Communications Corporation

Authorizations for A and B Block
Broadband PCS Frequencies

)
)
) GEN Docket No. 90-314
) RM-7140, RM-7175, RM-7618
)
)

OPPOSITION OF GTE MOBILNET INCORPORATED

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January 11, 1996

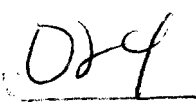


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SUMMARY

GTE Mobilnet Incorporated ("GTE Mobilnet") hereby opposes grant of the action sought by Advanced Cordless Technologies, Inc. ("ACT") in its Petition To Rescind or Suspend Authorizations, filed December 11, 1995 ("*ACT Petition*"). As the holders of block A and B personal communications service ("PCS") authorizations, GTE Mobilnet and its corporate affiliate, GTE Macro Communications Corporation, would be directly and adversely affected by any Commission action to grant the relief sought by ACT and thus rescind or suspend 99 of the A and B block PCS authorizations.

The *ACT Petition* should be promptly and emphatically dismissed or denied by the Commission. As an initial matter, ACT lacks standing to file its petition. Its claim that its pending appeal of a Commission denial of its pioneer preference request, combined somehow with the recent decision of the Sixth Circuit court regarding cellular-PCS cross-ownership rules, accords it standing ignores clear Commission standards. As articulated by the Commission approximately six months ago in response to petitions to deny filed against certain of the A and B block PCS auction winners by other disappointed pioneer preference applicants, ACT must show that it would be injured and that there is a causal link between the claimed injury and the challenged action. ACT cannot make this showing.

ACT completely ignores the adverse effects of its proposal for the public interest. ACT would disrupt the ongoing activities of 99 licensees seeking to construct

and operate their PCS systems -- in order to safeguard a speculative appeal that, if successful, could be addressed more narrowly in the context of the actual licenses that might be affected. Grant of the *ACT Petition* would undermine the Commission's policy goals for both PCS specifically and commercial mobile radio service more generally.

ACT has concluded that the Sixth Circuit has found unlawful the process by which the Commission awarded authorizations to the A and B block licensees and that these licensing decisions may be revisited depending upon what action the Commission takes in response to the Sixth Circuit action. ACT's conclusions are wrong. The Supreme Court has made clear that adjudicative and rulemaking proceedings entail different standards with respect to retroactive application of decisions. The case relied upon by ACT involved adjudication, where decisions often are applied retroactively. The proceeding forming the supposed basis for the claims contained in the *ACT Petition*, in contrast, is a rulemaking proceeding, where retroactivity generally is disfavored. Thus, as a legal matter, it seems unlikely that the Commission will readjust its eligibility standards for the A and B block PCS licenses, revoke the existing licenses, and then reconduct the A and B block auctions.

Finally, ACT's pleading appears to be nothing more than a late-filed petition to deny or petition for reconsideration of the Commission's grant of the A and B block licenses. As such, the filing is procedurally defective and should be dismissed.

For all these reasons, the Commission should promptly dismiss or deny the petition filed by ACT.

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OPPOSITION OF GTE MOBILNET INCORPORATED

GTE Mobilnet Incorporated ("GTE Mobilnet"), on behalf of itself and its corporate affiliate, GTE Macro Communications Corporation ("GTE Macro"), by its attorneys, hereby opposes¹ the Advanced Cordless Technologies, Inc. ("ACT") Petition To Rescind or Suspend Authorizations filed December 11, 1995, with respect to 99 of the A and B block personal communications service ("PCS") authorizations ("*ACT Petition*").² ACT argues that, in light of the recent Sixth Circuit court

¹ GTE Mobilnet had calculated that its opposition to the *ACT Petition* was due on December 21, 1995. Because the Commission was closed on that date, this reply is being submitted on the first day the Commission is open following the government shutdown. See FCC Public Notice, *FCC Announces Procedures for the Filing of Documents That Were Due During the Government Shutdown*, DA 96-1 (Jan. 5, 1996).

² ACT excludes the three PCS licenses awarded in accordance with the Commission's pioneer preference policies. See *ACT Petition* at 1, 2 n.1.

decision,³ the block A and B PCS authorizations "must be rescinded or held in abeyance pending the final outcome of legal processes in the matter."⁴

GTE Mobilnet and GTE Macro have a direct interest in the arguments made in the *ACT Petition*. Specifically, GTE Mobilnet holds the block B PCS authorizations for the Atlanta, Cincinnati-Dayton, and Denver MTAs, and GTE Macro holds the block A PCS authorization for most of the Seattle MTA.⁵ These authorizations are all challenged by the *ACT Petition*.

GTE Mobilnet opposes rescission or suspension of the A and B block PCS authorizations as requested by ACT. Initially, ACT lacks standing to file the *Petition*, and its alleged injury bears no relation to the grounds cited in support of its filing. Moreover, grant of ACT's request would be highly disruptive to the ongoing, substantial efforts of PCS license holders to implement their authorized systems and would thwart achievement of the Commission's goal of prompt deployment of PCS, for no valid purpose in light of the lack of justification therefor. Significantly, both Supreme Court and D.C. Circuit precedent suggest that any rule changes adopted in

³ See *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995) ("*Cincinnati Bell*").

⁴ *ACT Petition* at 2.

⁵ In addition, there is pending before the Commission an application seeking consent to the assignment of the Spokane-Billings MTA block A PCS authorization to GTE Macro.

response to the *Cincinnati Bell* decision may not be applied retroactively to the A and B block licenses but may prospectively affect only future PCS license awards.

Beyond GTE Mobilnet's substantive concerns with the *ACT Petition*, the filing is procedurally defective. ACT's submission appears to be an untimely filed petition for reconsideration of the license grants made by the Commission over six months ago. The *ACT Petition* accordingly should be promptly denied.

A. ACT Lacks Standing To Pursue PCS License Rescission or Suspension on the Grounds Alleged in Its Petition

ACT alleges it has standing to file the *Petition* as a result of its pending court appeal of the Commission's denial of ACT's pioneer preference request.⁶ ACT reasons that, if its appeal is successful, it "may be entitled to certain broadband PCS frequencies;"⁷ but, if the A and B block authorizations become final, "there will be no such frequencies available for ACT."⁸ ACT concludes that its economic interests therefore "are impacted by the outcome of proceedings following and in light of the decision by the Sixth Circuit in the *Cincinnati Bell* decision."⁹

⁶ *ACT Petition* at 2-3. See *Freeman Engineering Associates et al. v. FCC*, No. 94-1779, *et al.*

⁷ *ACT Petition* at 3.

⁸ *Id.*

⁹ *Id.*

ACT has failed to meet the Commission's standards for demonstrating standing to challenge an authorization or application. The Commission was confronted with a similar claim to standing in petitions to deny filed by Advanced MobileComm Technologies ("AMJ") and Digital Spread Spectrum Technologies ("DSST") against the A and B block PCS auction winners in the San Francisco and Boston MTAs.¹⁰ Like ACT, AMT and DSST are appealing the Commission's denial of pioneer preference awards to them.¹¹ Similarly to ACT, AMT and DSST sought to ensure that PCS frequencies would be available to them in the event that they win their court appeal and are subsequently awarded PCS authorizations in the A or B block.¹²

In addressing the claims of AMT and DSST to standing to file their petitions to deny, the Commission set out the test that is equally applicable to the *ACT Petition*:

To establish party in interest standing, petitioners must allege facts sufficient to demonstrate that grant of the subject application would cause them to suffer a direct injury. In addition, petitioners must demonstrate a causal link "between the claimed injury and the challenged action. To demonstrate a causal link, petitioners must establish that: (1) "these injuries fairly can be traced to the challenged action;" and (2) "the injury would be prevented or redressed by the relief requested."¹³

¹⁰ See *Application of Wireless Co., L.P. for a License To Provide Broadband PCS Service on Block A in the San Francisco Major Trading Area, et al.*, DA 95-1412 (June 23, 1995) ("*AMT/DSST PCS Order*").

¹¹ See *id.*, ¶ 2.

¹² *Id.*, ¶ 3.

¹³ *Id.*, ¶ 7 (footnotes omitted).

The Commission found that AMT and DSST lacked standing to file a petition to deny against the A and B block PCS applications. *First*, the FCC found the alleged injury to be too remote and speculative to confer standing, since possible harm was contingent on both favorable court action on the appeal and a subsequent decision by the Commission that the petitioners should be awarded a pioneer preference authorization.¹⁴ *Second*, the Commission found that, even if AMT and DSST should be successful in their court appeal, "they cannot demonstrate any injury traceable to the grant of the licenses."¹⁵ The Commission explained that, "in the unlikely event that Petitioners win their appeal, the Commission could elect to rescind the A block licenses and award them to petitioners."¹⁶

The same analysis applies to the effort of ACT to rescind or suspend the now granted A and B block authorizations. In the same manner as AMT and DSST, ACT's injury is speculative and remote -- it must win a court appeal of a Commission decision and then it must convince the Commission on remand that it warrants grant of a pioneer preference (a feat that it already has failed several times to accomplish). These events are too hypothetical to support a finding that ACT has standing as a party in interest in these proceedings.

¹⁴ *Id.*, ¶ 8.

¹⁵ *Id.*, ¶ 9.

¹⁶ *Id.*

Again, like AMT and DSST, ACT cannot demonstrate that its claimed injury derives from the continued effectiveness of the A and B block PCS authorizations. Should ACT succeed in its court appeal, then the Commission would be free to take those steps necessary to accord ACT proper treatment as a pioneer preference awardee, including, if appropriate, rescission of one or more of the A and B block licenses. As a result, ACT lacks standing to seek rescission or suspension of 99 of the block A and B PCS authorizations.

GTE Mobilnet also points out the lack of any connection between ACT's supposed interest in this proceeding and the *Cincinnati Bell* decision concerning cellular-PCS cross-ownership rules. ACT asserts -- erroneously -- that the Sixth Circuit has declared "unlawful" the A and B block licensing process.¹⁷ Relying on that development as well as the pending application for review filed by the National Association of Black Owned Broadcasters, the National Association for the Advancement of Colored People, and Percy E. Sutton,¹⁸ ACT seeks somehow to connect these matters with its concerns about its pending pioneer preference appeal and its desire to protect a contingent award of a block A or B license. ACT ignores the fact that issues presented by the *Cincinnati Bell* opinion and the NABOB Application for Review could have already been resolved, leading to full finality of the A and B

¹⁷ ACT Petition at 2.

¹⁸ National Association of Black Owned Broadcasters, National Association for the Advancement of Colored People, and Percy E. Sutton Application for Review, File No. 00001-CW-L-95 *et al.* (filed July 21, 1995) ("NABOB Application for Review").

block authorizations without any regard to the timing of resolution of ACT's court appeal.¹⁹ This circumstance further highlights the attenuated nature of ACT's interest in seeking to rescind or suspend the A and B block licenses.²⁰

B. ACT's Requested Relief Would Impede the Efforts of Licensees To Construct and Operate PCS Systems

The *ACT Petition* fails to take into account the adverse effects for the public interest of rescinding or holding in abeyance 99 of the block A and B PCS authorizations. The A and B block authorizations were granted over six months ago, and PCS licensees like GTE Mobilnet and GTE Macro necessarily are well underway in their efforts to implement their authorized systems in order to meet Commission build-out requirements.²¹ This effort entails the expenditure of substantial resources in designing the system, obtaining sites (including required zoning clearances), constructing transmission as well as other operational facilities, establishing marketing plans, and developing the necessary service infrastructure. In addition, PCS licensees

¹⁹ GTE Mobilnet notes that ACT filed no applications for any of the A and B block authorizations.

²⁰ Indeed, the timing and nature of ACT's filing calls into question its purposes in submitting the *Petition*.

²¹ See 47 C.F.R. § 24.203 (1994).

around the country are engaged in negotiations to relocate existing fixed microwave licensees in order to permit implementation of their respective PCS systems.²²

Grant of the relief proposed in the *ACT Petition* would halt this activity around the country.²³ The result would be a delay in the initiation of PCS operations in virtually all MTAs. This would run directly counter to the Commission's stated policies for bringing PCS promptly to the marketplace and for increasing the number of wireless service offerings from which the public may choose.²⁴ The public interest would thus be disserved by granting the relief sought by ACT.

C. Any Changes to the Commission's PCS Rules Resulting From the *Cincinnati Bell* Opinion Should Be Applied Only Prospectively and Not Retroactively to the A and B Block Authorizations

ACT claims that the *Cincinnati Bell* decision "declares unlawful the process by which all but three A and B broadband authorizations have been granted."²⁵ ACT then

²² The block A and B PCS licensees also have paid over \$7 billion to the U.S. Treasury for their authorizations.

²³ ACT disregards the fact that, if ACT has success before the court and the Commission, the Commission could act with respect to only those authorizations implicated by affording ACT appropriate relief -- instead of placing much of the industry "on hold."

²⁴ E.g., *Deferral of Licensing of MTA Commercial Broadband PCS*, DA 95-1410, ¶ 32 (June 23, 1995); *Deferral of Licensing of MTA Commercial Broadband PCS*, DA 95-806, ¶ 4 (Apr. 12, 1995); *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 9 FCC Rcd 6858, 6864 (1994); *Personal Communications Services*, 8 FCC Rcd 7700, 7704 (1993).

²⁵ *ACT Petition* at 2.

supports its request for rescission or suspension of the A and B block licenses by citing *Orion Communications, Ltd.*, FCC 95-456 (Nov. 29, 1995), as holding that an authorization may be rescinded or held in abeyance "where a party proceeds with construction and commences operations after notice of a Circuit Court decision that its authorization was not lawfully issued."²⁶ The apparent point of ACT's argument is that any changes to the Commission's cellular-PCS cross-ownership rules necessarily must be applied to the A and B block licensing procedures.

ACT incorrectly applies the standards regarding retroactive application of newly adopted agency rules. The Supreme Court has stated that:

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.²⁷

The Communications Act does not grant to the Commission the authority to apply revised PCS eligibility rules retroactively to the A and B block licensees.²⁸

In taking its position, ACT inappropriately relies upon decisions reached by the Commission and the courts in adjudicatory proceedings -- where different standards concerning retroactivity apply. The D.C. Circuit has explained:

²⁶ *Id.*

²⁷ *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). *See also* *MCI v. FCC*, 10 F.3d 842, 846 (D.C. Cir. 1993); *Motion Picture Association of American v. Oman*, 969 F.2d 1154, 1156 (D.C. Cir. 1992).

²⁸ *See* 47 U.S.C. § 154(i) (Supp. V 1993).

In adjudication, retroactivity is the norm; in legislation it is the exception. In rulemaking, the administrative analogue to legislation, exceptions are fewer still.²⁹

ACT's citation to *Orion Communications* is inappropriate in the present context; *Orion Communications* involved an adjudication of a specific case, while the *Cincinnati Bell* decision cited by ACT involves a rulemaking proceeding.

Accordingly, there is no basis for the Commission to apply retroactively to the A and B block authorizations any changes in its PCS rules adopted to comply with the *Cincinnati Bell* decision. As a result, ACT's claims in support of rescission or suspension of the licenses lack any legal rationale and must be denied.

D. The ACT Petition Is Nothing More Than an Untimely Petition for Reconsideration

The *ACT Petition* is procedurally defective, and may be dismissed on that basis as well. Specifically, ACT's tardy proposals to impede licensee implementation of their authorized facilities must be viewed as an untimely petition to deny the underlying applications or an untimely petition for reconsideration of the grant of the licenses. The applications for the winning A and B block PCS auction winners were placed on public notice as accepted for filing on April 12, 1995.³⁰ As a result, petitions to deny

²⁹ *MPAA v. Oman*, 969 at 1155.

³⁰ *See FCC Public Notice*, Rpt. No. CW-95-09 (Apr. 12, 1995).

such applications were due on May 12, 1995.³¹ ACT did not file any petition to deny any of the applications.³²

On June 23, 1995, the Commission denied all petitions to deny and granted authorizations to all of the A and B block PCS auction winners.³³ Petitions for reconsideration of the license grants were due 30 days thereafter.³⁴ ACT again made no filing. Although ACT could easily have raised its concerns at that time, and specifically requested the Commission to condition the licenses to take account of the pending appeal, ACT instead chose to wait until more than six months after the license grants. Clearly, reconsideration of the Commission's license grants at this time is untimely, and ACT's proposal to do so must be rejected.

³¹ *See id.*

³² *See FCC Public Notice*, Rpt. No. CW-95-3 (May 15, 1995).

³³ *See Deferral of Licensing of MTA Commercial Broadband PCS*, DA 95-1410 (June 23, 1995); *Applications for A and B Block Broadband PCS Licenses*, DA 94-1411 (June 23, 1995); *Application of Wireless Co., L.P. for a License To Provide Broadband PCS Service on Block A in the San Francisco Major Trading Area, et al.*, DA 95-1412 (June 23, 1995); *Application of Pacific Telesis Mobile Services for a License To Provide Broadband PCS Service on Block B in the Los Angeles-San Diego Major Trading Area*, DA 95-1143 (June 23, 1995); *Application of Pacific Telesis Mobile Services for a License To Provide Broadband PCS Service on Block B in the San Francisco-Oakland-San Jose Major Trading Area*, DA 95-1414 (June 23, 1995).

³⁴ 47 C.F.R. § 1.106 (1994).

CONCLUSION

The Commission should deny the *ACT Petition*. ACT lacks any standing to seek rescission or suspension of the A and B block PCS authorizations. As demonstrated above, such action would be highly disruptive to the public interest without justification. Moreover, ACT's claim that any revisions adopted by the Commission to its eligibility rules pursuant to the *Cincinnati Bell* order would necessarily invalidate the already granted authorizations is an unsound statement of the applicable law. The Commission should promptly act to resolve this matter and ensure that PCS implementation under the existing licenses is not adversely affected by the ACT filing.

Respectfully submitted,

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January 11, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 1996, I caused copies of the foregoing "Opposition to GTE Mobilnet Incorporated" to be mailed via first-class postage prepaid mail to the following:

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